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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1718

LEWIS W. POE,
Petitioner,

vs.

CHARLES F. G. KUYK, JR., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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June, 1979

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On page 2 of the Memorandum for the Respondents in Opposition (hereafter "Resp. Memo."), the Respondents (hereafter the "Solicitor General") *erroneously* wrote:

"This case ended in a holding of improper venue."

Mr. Poe wrote:

> "On April 12, 1978, the District Court of Delaware dismissed the complaint on the grounds of *insufficiency of service of process.*" (Pet. 6)

Please note that the Solicitor General did not challenge, with supportive facts, the petitioner's "Statement of the Case" (Pet. 4-8). Moreover, on April 19, 1978, the District Court of Delaware wrote in an order:

"defendants' motion to dismiss the action, treated by this Court as a motion to dismiss the complaint * * *, was granted due to insufficiency of service of process."

Venue in the judicial district of Delaware has *never* been an issue. The issue was the sufficiency of the service of process. See Pet. App. A2 and A13. Poe alleged in his *Delaware* complaint, Civil Action No. 76-0292:

"4. Many of the acts upon which this complaint is founded were performed or took place within the State of Delaware."

Having not done his homework, the Solicitor General again *erroneously* wrote:

"Petitioner argues that the question of venue * * * should be heard by this Court.[2]

[Footnote] [2]Because this suit was dismissed on venue grounds, the substantive issues raised by petitioner are not properly presented." (Resp. Memo. 2)

This is sheer nonsense, and Poe will not waste his time belaboring the point. Thus, the Solicitor General's contention that petitioner cannot bring this suit in Delaware under 28 U.S.C. 1391(e) "even if Section 1391(e) applies to damages actions" (Resp. Memo. 2-3) is totally without merit. In addition, the Solicitor General *incorrectly* wrote (Resp. Memo. 3):

"Because petitioner's claims arose at a medical center in Ohio (see Pet. 4), the cause of action did not arise in Delaware;"

Mr. Poe wrote in clear language:

"This case revolves around at least one *conspiracy* of Air Force officers, * * *, to cause his false arrest and psychiatric imprisonment * * *." (Pet. 4)

"While assigned as a *trainee* * * *, Dover AFB, Delaware, * * *.

* * *.

On May 29, 1974, Poe was arrested, transported under duress to Maryland and Ohio, and physically confined * * *." (Pet. 5)

Furthermore, in paragraphs 16 and 17 of his *Delaware* complaint, Poe alleged, in part, as follows:

"16. Plaintiff is seeking compensatory and punitive damages from individuals for violation of the Air Force's own regulations and for violation of the First, Fourth, Fifth, Eighth, and/or Ninth Amendments to the U.S. Constitution. This civil action stems from a conspiracy of Air Force physicians and commanders to discredit the plaintiff, to thwart, obstruct, or defeat the due course of justice, to prevent the plaintiff from exercising his lawful rights, to confine the plaintiff in USAF psychiatric facilities without actual cause, to separate plaintiff from the Air Force by deception and fraud, and to actively and fraudulently conceal their wrongdoing for the purpose of preventing the truth of the plaintiff's allegations from becoming known. The named conspirators * * * fabricated and published libelous and misleading statements about the plaintiff in order to effectively destroy the plaintiff's credibility by portraying the plaintiff as 'mentally ill.'

17. This case centers around a conspiracy of Air Force officers, acting under color of federal law in excess of their legal authority, to wantonly and maliciously discredit and defame the plaintiff, to cause his false arrest and imprisonment, in violation of the Air Force's own regulations and the Federal Constitution, and to wrongfully separate the plaintiff from the USAF *in*

order to cover-up an abominable sequence of injustices, wrongdoings, and the gross dereliction in the performance of military duties *for self-benefit.* * * *."

Ergo, this cause of action most certainly did arise in Delaware, and the Solicitor General's claim that "petitioner's claims" arose at a medical center in Ohio is only partly true, depending on the full meaning of the phrase "petitioner's claims."

The Solicitor General mistakenly wrote:

"Now that the Ninth Circuit has instructed the Hawaii court to accept jurisdiction (see *Poe* v. *Kuyk, supra,* slip op. 3), there is no need whatever for the Delaware court to adjudicate this case. Petitioner has an adequate forum." (Resp. Memo. 3)

Mr. Poe disagrees for the following reasons and points:

1. This cause of action clearly arose in the judicial district of Delaware and extended itself to States, such as, Maryland and Ohio.

2. The depositions upon oral examination of Donna May Ellisen and Arthur R. Ellisen are on file in the District Court of Delaware (filed 1-9-78).

3. There are witnesses, both military and civilian, still stationed at Dover AFB, Delaware. There are witnesses in the Washington, D.C. area.

4. Would this Court have to resolve the Questions Presented (Pet. 2) had the Ninth Circuit not reversed and remanded the case to the District Court of Hawaii?

5. Mr. Poe does not really know whether the *Hawaii District Court* is a fair tribunal because there is pending in the Ninth Circuit a Petition for Writ of Mandamus Directed to a Judge, No. 78-3125, *Poe* v. *U.S. District Judge Samuel P. King,* requesting that Judge King no longer

sit on any proceeding in the case of *Poe* v. *Department of the Air Force, et al.,* in Civil No. 77-0262. Thus, Poe would now have to file another mandamus petition in the Ninth Circuit *to insure judicial impartiality* in the *remanded* case (*Poe* v. *General Kuyk, Jr., et al.,* DC No. 76-0005).

6. On Poe's appeal from the Delaware district court[1] to the Third Circuit, the issues were:

I. Whether defendant McVicar made a voluntary appearance to defend on the merits, and, thereby, waived the defense of insufficiency of service of process.

II. Whether defendants Conrad, King, and Zykorie made a voluntary appearance such that they waived the defense of lack of jurisdiction over their person and the defense of insufficiency of service of process.

III. Whether the venue and service provisions of 28 U.S.C. § 1391(e) apply to defendants Kuyk and/or Levinson.

IV. *Assuming* there was an insufficiency of service of process upon defendants McVicar, Kuyk, Levinson, Jones, and Mitchell, whether the Dis-

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1. Poe's complaint was filed on 9-3-76 in the U.S. District Court for the District of Delaware, Civil Action No. 76-0292, *Poe* v. *Kuyk, Jr., et al.* On October 4, 1976, defendant McVicar entered his "voluntary" appearance in the District Court of Delaware and moved to dismiss the action for failure to state a claim and to quash the return of service of summons. No other defense nor objection then available to defendant McVicar was raised by McVicar.

On December 23, 1976, defendants Kuyk, Jones, Levinson, Mitchell, Conrad, King, and Zykorie [the last 3 defendants were never served with process] entered their appearances in the District Court of Delaware, moving to dismiss the action. Defendant McVicar, *without* permission and in violation of Rule 12(g) of the FRCivP, *joined* these 7 named defendants.

trict Court abused its discretion by not transferring this civil action, pursuant to 28 U.S.C. § 1406(a), to the U.S. District Court for the District of Columbia, Washington, D.C., where defendants Kuyk and Levinson could have been personally served with process.[2]

The Solicitor General wrote:

"The Ninth Circuit concluded that Section 1391(e) could be invoked if any one of the defendants could be sued in the District of Columbia. *It apparently understood this to be the argument made by the United States Attorney;* * * *." (Resp. Memo. 4, n. 5) [Emphasis supplied.]

This was precisely the argument made by the U.S. Attorney, District of Hawaii, for we find the following in the defendants' [General Kuyk, Colonel McVicar, and Lt. Col. Levinson] Motion to Dismiss for Lack of Venue:

"Since none of the defendants are stationed in the District of Columbia, Section 1391(e) is not authority for bringing action in the District of Hawaii. * * *.

Therefore it is the Government's position that the complaint should be dismissed for lack of venue and that none of the federal defendants could have been sued in the District of Columbia because they have no official station there." (Record on Appeal, p. 127, 9th Cir. No. 77-1674, *Poe* v. *General Kuyk, Jr., et al.*)

On page 141 of the same Record on Appeal, the U.S. Department of Justice *admitted* that General Kuyk was

2. The opinionless and/or memorandumless judgments of the Third Circuit in this appeal are history. See Pet. App. A14-A17; see Pet. 8.

stationed at the Pentagon, *District of Columbia.* Then the Solicitor General continues:

"But this is not the argument the United States made in *Stafford* and *Colby.* * * *." (Resp. Memo. 4, n. 5)

Since the Solicitor General is specifically examining the reasoning of the Ninth Circuit, Poe is not concerned about what "*new*" argument was made in *Stafford* and *Colby.* He is concerned about the reasoning and argument which were before the Ninth Circuit. However, perhaps the "arguments" of the U.S. Attorney are quite changeable, depending in which court the U.S. Attorney happens to be standing at the time.

The Solicitor General *erroneously* stated:

"*Poe* v. *Mitchell, supra,* established that the military personnel *who arrested* (emphasis supplied) and treated him are entitled to immunity. That holding * * *." (Resp. Memo. 4, n. 6)

First, how could that proposition be "established" in that case where Dr. Mitchell is the *sole* military defendant in the case and had nothing to do with Poe's false arrest in Delaware? The *Poe* v. *Mitchell* suit was not predicated on the false arrest. It was based on unlawful medical examination, medical mistreatment, trespass, invasion of privacy, and the publishing of a deliberately false and fraudulent psychiatric report. Second, what type of immunity are we talking about, for whom, and on what basis? Is the Solicitor General proposing absolute immunity for *all* "investigative or law enforcement officers of the United States Government" under all circumstances? The Supreme Court has never expressly ruled on the issue of absolute immunity for military doctors

where military doctors were either acting within their line of duty or outside their line of duty, or where military physicians committed acts of (honest) negligence as opposed to (deliberate) medical fraud. Justice White, dissenting from the denial of certiorari in No. 76-530, aptly stated:

> "nowhere has it been suggested that there is a judicially created unqualified immunity for Government functionaries operating at respondents' level. * * * the District of Columbia Circuit held that an Army medical officer was not entitled to absolute immunity from suit. *Henderson* v. *Bluemink*, 167 U.S. App. D.C. 161, 511 F.2d 399 (1974)." *Martinez* v. *Schrock*, 430 U.S. 920, 921-922 (1977).

Third, in one breath, the Solicitor General asserts a *sweeping* immunity "holding" while in another breath he suppresses it. See Resp. Memo. 1 (last 4 lines). Fourth, even assuming, *arguendo*, that such a "holding" exists, the concept of collateral estoppel would appear inappropriate in a situation where a full and fair *opportunity to initially litigate* the dispositive issues of qualified and/or absolute immunity was *never accorded Mr. Poe*. The district court and the Sixth Circuit summarily and prematurely immunized Dr. Mitchell on the ill-founded *assumption* that he had acted within the scope of his duties and, moreover, in utter disregard of the allegation of medical fraud by Dr. Mitchell, which was stated with particularity in Poe's complaint.

The Solicitor General mistakenly wrote:

> "Petitioner's attempt to proceed further against Mitchell is barred by res judicata." (Resp. Memo. 2, n. 1)

Let's assume, *arguendo*, that there was a valid "holding that the physician who ordered petitioner's treatment is absolutely immune from damages liability." (Resp. Memo. 1). Then, Dr. Mitchell would have been absolutely immunized on the basis of medical mistreatment and, possibly, falsification of medical documents. A grant of immunity on that basis in that cause of action would not apply in the instant case of conspiracy where Dr. Mitchell, *as a co-conspirator*, would be liable for the acts perpetrated and committed by the military personnel at Dover AFB, Delaware, and Andrews AFB, Maryland. Thus, the asserted "res judicata" would be inapplicable to the instant case—a different cause of action.

The Solicitor General wrote:

> "For several years[3] petitioner has been litigating questions concerning his medical treatment[4] and discharge[5] by the armed forces. He has filed at least six suits." (Resp. Memo. 1)

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3. Even if it takes years, it's no crime to exercise one's legal rights. Mr. Poe took 3 years to overturn the Hawaii District Court in *Poe* v. *General Kuyk, Jr., et al.*, Hawaii Civil No. 76-0005.

4. Namely, unconstitutional and unlawful medical *mistreatment* which at the very least constituted trespass and the invasion of Poe's privacy and bodily sanctity—not to mention the medical *fraud* which was perpetrated thereafter by Respondent Mitchell.

5. Poe's discharge was virtually "incidental," considering the grave constitutional transgressions which are being litigated at this very moment, such as, (a) unreasonable search and seizure without probable cause, (b) deprivation of life, liberty and/or property without due process of law, (c) infliction of cruel and unusual punishment, (d) the abridgement of freedom of speech, (e) deprivation of right to freedom of association and right to petition the Government for redress of grievances, (f) deprivation of right to refuse unreasonable, unnecessary, unwarranted, and dangerous drug treatment, (g) deprivation of right to be advised if hospital proposes to engage in human experimentation, (h) involuntary submission to unnecessary drugs in order to obtain *civilian* documentary proof that *military* psychiatrist committed medical fraud.

Perhaps the number of lawsuits and Poe's persistence in protecting what's left of his reputation and the rights of honorable servicemen suggest the underlying gravity, injustice, and unconstitutionality of what has happened to Captain Poe at Dover AFB, Andrews AFB, and Wright-Patterson AFB. See Pet. for Cert., 11-2-78, No. 78-733, *Poe* v. *Mitchell*, pages 5-6; Pet. for Cert., 10-10-78, No. 78-589, *Poe* v. *United States*, pages 7-10; Pet. for Cert., 1-9-78, No. 77-996, *Poe* v. *Stetson*, pages 6-10. In sum, Mr. Poe has been primarily litigating constitutional issues, arising from a military conspiracy which resulted in his false arrest, false imprisonment, medical mistreatment, medical fraud, and an abuse of process.

Although Poe would like to comment upon the "holdings" asserted by the Solicitor General (Resp. Memo. 1), such additional comments would not be significantly relevant to the purpose of this paper and to the instant case.

The fundamental thrust of this Delaware lawsuit against 8 named co-conspirators and defendants can be summarized by posing a question, to wit:

> When a serviceman's personal freedom and liberty would pose no danger to himself nor to others, does a *wholly sane, innocent,* and *honorable* serviceman have a constitutional right *not* to be falsely arrested and physically confined in a governmental psychiatric institution in the absence of due process of law?

This is one of the constitutional questions presented today (Pet. 2) and was basically presented in early 1978. See Pet. for Cert., No. 77-996, *Poe* v. *Stetson*, page 2. Finally, Ninth Circuit Judge Walter Ely wrote nearly two years ago:

> "In short, Poe is entitled, at some time, to have his grievances aired in a federal forum." (*Id.*, page A3)

In the interest of truth and justice, the petitioner urges this Court to grant his petition for a writ of certiorari.

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June, 1979